

1994

State of Utah v. Abraham Reyes Burciaga : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 940371-CA
v.	:	Priority No. 2
ABRAHAM REYES BURCIAGA,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

- - - - -

APPEAL FROM A CONVICTION OF ATTEMPTED SODOMY
ON A CHILD, A SECOND DEGREE FELONY, IN
VIOLATION OF UTAH CODE ANN. § 76-5-403.1
(1990) AND § 76-4-101 (1990), IN THE FIFTH
JUDICIAL DISTRICT COURT, WASHINGTON COUNTY,
THE HONORABLE JAMES L. SHUMATE PRESIDING

**UTAH COURT OF APPEALS
BRIEF**

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ORAL ARGUMENT NOT REQUESTED

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COURT OF APPEALS

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF THE PROCEEDINGS

This is an appeal from a conviction of attempted sodomy on a child, a second degree felony, in violation of Utah Code Ann. § 76-5-403.1 (1990) and § 76-4-101 (1990). (Defendant does not appeal his conviction for attempted aggravated sexual abuse of a child.) This Court has jurisdiction over the matter pursuant to Utah Code Ann. § 78-2a-3(2)(f) (1995).

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

Did defendant's act of exposing his penis and inviting a nine-year-old girl to perform oral sex constitute a substantial step toward committing the crime of sodomy on a child?

This Court will "review the evidence and all reasonable inferences drawn therefrom in the light most favorable to the verdict." State v. Perry, 871 P.2d 576, 581 (Utah App. 1994) (quoting State v. Germonto, 868 P.2d 50," 55 (Utah 1993)). If it finds "some evidence or inferences upon which findings of all the requisite elements of the crime can reasonably be made, [it will] affirm." *Id.* "When reviewing the findings of a trial judge

sitting without a jury, this court will overturn a guilty verdict only if it is clearly erroneous." State v. Perry, 871 P.2d 576, 581 (Utah App. 1994) (quoting State v. Taylor, 818 P.2d 1030, 1031 (Utah 1991) cert. denied, 112 S. Ct. 1576 (1992) (citing State v. Walker, 743 P.2d 191, 192-93 (Utah 1987))).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 76-5-403.1 (1990). **Sodomy on a child.**

(1) A person commits sodomy upon a child if the actor engages in any sexual act upon or with a child who is under the age of 14, involving the genitals or anus of the actor or child and the mouth or anus of either person, regardless of the sex of either participant.

Utah Code Ann. § 76-4-101 (1990). **Attempt - Elements of offense.**

(1) For purposes of this part a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.

(2) For purposes of this part, conduct does not constitute a substantial step unless it is strongly corroborative of the actor's intent to commit the offense.

STATEMENT OF THE CASE

Defendant was charged by amended information as follows:

Count I Aggravated sexual abuse of a child, a first degree felony, in violation of Utah Code Ann. § 76-5-404.1 (1990);

Count II Attempted sodomy on a child, a second degree felony, in violation of Utah Code Ann. § 76-5-403.1 (1990); and

Count III Lewdness involving a child, a class A misdemeanor, in violation of Utah Code Ann. § 76-9-702.5 (1990).

(R. 23-24).

After a one-day bench trial, defendant was convicted of attempted aggravated sexual abuse of a child and attempted sodomy

on a child (R. 278-80). The lewdness count was dismissed (R. 279). Defendant was sentenced to two consecutive one-to-fifteen-year sentences (R. 89-90). He timely appealed (R. 93).

STATEMENT OF FACTS

In the spring of 1992, nine-year-old Christie M.'s parents left her alone in a motel room with defendant, who was to baby-sit her while they went to the store (R. 219-20, 278). Defendant was 31 (R. 23). Immediately after Christie's parents left, defendant asked her if she knew what a "hard-on" was, to which she responded that she did (R. 166-67). He then pulled his pants down to his knees, allowing Christie to see at least part of his "private." While his pants were down, defendant asked Christie, "Do you want to suck it?" and she said "No." He then waited a minute and pulled up his pants (R. 167-70).

Defendant then approached Christie and tried to touch her "private" and her "butt," but she prevented him by moving away (R. 167, 172). At this point Christie told defendant to stop, but he did not listen until she told him to stop for a second time. He then tried to rub Christie's chest, and again she pleaded with him to stop (R. 167). When defendant finally stopped, she ran out the door, but not before defendant asked her not to tell anyone about the incident (R. 174).

The trial court found that defendant "dropped his trousers to his knees and exhibited his penis to Christie and specifically offered to her the performance of an act of sodomy" and that he did

so "with the intent to accomplish an act of sodomy" and "attempting to accomplish such an act of sodomy" (R. 278-79).

SUMMARY OF THE ARGUMENT

Defendant's act of dropping his trousers, exposing his penis, and inviting Christie to "suck it" constituted a substantial step toward the commission of the crime of sodomy on a child. He was therefore properly convicted of attempted sodomy on a child.

ARGUMENT

THE EVIDENCE ESTABLISHED THAT DEFENDANT TOOK A
SUBSTANTIAL STEP TOWARD COMMISSION OF THE
CRIME OF SODOMY ON A CHILD

Defendant claims that "[v]iewing the evidence in a light most favorable to the Court's verdict, Defendant's conduct does not rise to the level of a substantial step toward the commission of the offense of Sodomy on a Child." Br. of Appellant at 4.

Although defendant has marshalled the evidence in support of the trial court's findings as required by State v. Perdue, 813 P.2d 1201, 1207 (Utah App. 1991), he has failed to demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be "against the clear weight of the evidence," and therefore "clearly erroneous." *Id.*

Sodomy upon a child is defined as follows:

A person commits sodomy upon a child if the actor engages in any sexual act upon or with a child who is under the age of 14, involving the genitals or anus of the actor or child and the mouth or anus of either person, regardless of the sex of either participant.

Utah Code Ann. § 75-5-403.1(1) (1990).

A person is guilty of attempt if, "acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense." Utah Code Ann. § 76-4-101(1) (1990). To constitute a substantial step, the conduct must be "strongly corroborative of the actor's intent to commit the offense," Utah Code Ann. § 76-4-101(2) (1990), which means the conduct must be greater than mere preparation. State v. Johnson, 821 P.2d 1150, 1157 (Utah 1991).

Therefore, the question before this Court is whether defendant's acts of asking a nine-year-old if she knew what a "hard-on" was, pulling down his pants, and asking if she wanted to perform oral sex constituted a substantial step toward the commission of sodomy on a child.

One Utah case presents facts closely analogous to the case at bar. In State v. Anderson, 797 P.2d 416, 417 (Utah 1990), the defendant was convicted of attempted sodomy on a child after he invited two boys into his room and requested that they engage in sodomy with him. Anderson appealed on various grounds, but did not challenge the sufficiency of the evidence. The Utah Supreme Court's opinion affirming the conviction is therefore of limited precedential value here.

However, some jurisdictions have held that verbally soliciting a minor to participate in a sexual act, without more, constitutes a "substantial step" toward commission of the offense. In Wittschen v. State, 383 S.E.2d 885, 886 (Ga. 1989), the defendant,

while sitting in a van, offered two young girls money if they would let him stick his hand down their pants. The Georgia Supreme Court held that this proposition "had definitely gone beyond mere preparation" and constituted a substantial step towards the commission of the crime of child molestation. *Id.* at 887.

Ward v. State, 528 N.E.2d 52 (Ind. 1988) is another example. Ward asked an eleven-year-old boy three times if he would like Ward to perform fellatio on him. The Supreme Court of Indiana held "that Ward's solicitation was a substantial step toward committing child molestation." *Id.* at 53. The court employed an three-pronged test for determining when solicitation constitutes an attempt: "1) the solicitation takes the form of urging; 2) the solicitation urges the commission of the crime at some immediate time and not in the future; and 3) the cooperation or submission of the person being solicited is an essential feature of the substantive crime." *Id.* at 54 (citing Perkins, *Criminal Attempt and Related Problems*, 2 UCLA L.Rev. 319, 353 (1954-55)).

In State v. Fristoe, 658 P.2d 825 (Ariz. Ct. App. 1982), Fristoe pulled his truck up beside several girls and offered them money to let him "kiss between their legs." *Id.* at 827. Fristoe argued on appeal that "some overt act is required for an attempt to commit a crime to have taken place and that his mere speaking of words with no other physical movement cannot be considered an act." *Id.* at 829. The Arizona Court of Appeals held that "his words constituted acts sufficient to sustain a conviction for attempt

viewed in light of the circumstances in which they were uttered." *Id.* at 831.

These precedents, finding an attempt based on speech alone, apply a *fortiori* here, where defendant's verbal proposition was accompanied by the unequivocal act of dropping his trousers, presenting his penis, and inviting the child to "suck it."

Logic underscores this conclusion. It is difficult to imagine what further intermediate steps would be necessary before defendant had taken a substantial step towards the commission of the offense. Indeed, had Christie complied with defendant's request, the crime would have been complete without any further act on his part.

Likewise, defendant's conduct was "strongly corroborative of [his] intent to commit the offense" of sodomy on a child. Utah Code Ann. § 76-4-101(2) (1990). Again, it is difficult to imagine what other possible intent defendant's acts might evidence.

Finally, defendant's claim that he "did nothing to coerce or even encourage the victim to engage in an act of sodomy," Br. of Appellant at 5, misreads the law and the facts. Physical coercion is not an element of sodomy on a child. See Utah Code Ann. § 76-5-403.1 (1990). And in view of the undisputed facts, defendant's claim that he did not encourage the victim to engage in an act of sodomy is frivolous.

CONCLUSION

Defendant's conviction should be affirmed.

ORAL ARGUMENT NOT REQUESTED

Because the facts and legal arguments are adequately presented in the briefs, oral argument would not significantly aid the Court in deciding this case. However, a published opinion would be a useful addition to the law of this state.

RESPECTFULLY SUBMITTED this 29 day of June, 1995.

JAN GRAHAM
Attorney General

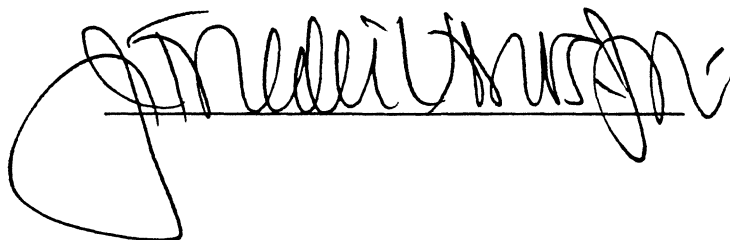

J. Frederic Voros, Jr.
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that a true and accurate copy of the foregoing Brief of Respondent was mailed this 29 June, 1995, postage prepaid, as follows:

Douglas D. Terry
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St. George, Utah 84770

Attorney for defendant/appellant

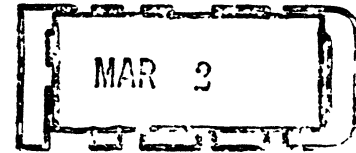


ADDENDUM A

Amended Information

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FIFTH JUDICIAL DIST. COURT
WASHINGTON COUNTY



[Signature] CLERK
DEPUTY

FIFTH JUDICIAL DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH,)	
Plaintiff,)	Bail \$ _____
vs.)	AMENDED INFORMATION
ABRAHAM REYES BURCIAGA,)	Criminal No. 931500066
DOB: 08-13-60)	
SSN: 541-68-3287)	
Defendant.)	

The undersigned complainant, under oath states on information and belief that the Defendant committed the crimes of:

COUNT I: AGGRAVATED SEXUAL ABUSE OF A CHILD, a 1st Degree Felony, in that said Defendant, between March, and May, 1992, in Washington County, State of Utah, under circumstances not amounting to rape of a child, object rape of a child, or sodomy of a child, did touch the anus, buttocks, or genitalia or the breasts of a female child, CM, who was under the age of 14, or otherwise took indecent liberties with a child, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant; and the accused, prior to sentencing for this offense, was previously convicted of any felony, or a misdemeanor, involving a sexual offense, in violation of Section 76-5-404.1(1)(3)(e), Utah Code Annotated 1953, as Amended, which is punishable by imprisonment in the State Prison for a term which is a minimum mandatory term of 3, 6, or 9 years, and which may be for life.

COUNT II: ATTEMPTED SODOMY ON A CHILD, a 2nd Degree Felony, in that said Defendant, between March, and May, 1992, in Washington County, State of Utah, did attempt to engage in a sexual act upon or with a child, CM, who was under the age of 14, involving the genitals or anus of the actor or the child and the mouth or anus of either person regardless of the sex of either participant, in violation of Section 76-5-403.1, Utah

Code Annotated 1953, as Amended.

COUNT III: LEWDNESS INVOLVING A CHILD, a Class A Misdemeanor, in that said Defendant, between March, and May, 1992, in Washington County, State of Utah, under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, sexual abuse of a child, or an attempt to commit any of those offenses, did expose his genitals or private parts, or did perform an act of gross lewdness, under circumstances which he knew would likely cause affront or alarm to, on, or in the presence of another who is under 14 years of age, in violation of Section 76-9-702.5, Utah Code Annotated 1953, as Amended.

This information is based on evidence from this witness:
Russell Peck

DATED: 3/2/93

Filing Authorized


W. BRENT LANGSTON
DEPUTY WASHINGTON COUNTY ATTORNEY